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Rocky Mountain State Bank v. Fire Insurance Exchange : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT

OF THE STATE OF UTAH

IN THE MATTER OF THE POSSESSION OF ROCKY MOUNTAIN STATE BANK BY THE COMMISSIONER OF FINANCIAL INSTITUTIONS, Plaintiff and Respondent, v. FIRE INSURANCE EXCHANGE, Defendant and Appellant.	Case No. 880345 Category 14(b)

BRIEF OF RESPONDENT

Appeal from the Judgment of the
Third Judicial District Court, Salt Lake County
Honorable J. Dennis Frederick

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JURISDICTIONAL STATEMENT AND NATURE OF PROCEEDINGS BELOW

This Court has jurisdiction over this appeal pursuant to Utah Code Ann. §78-2-2(3)(j) (1988). Appellant appeals from the Third District Court's order refusing to lift a statutorily-imposed stay and from the court's order affirming an administrative denial of claim.

ISSUES PRESENTED

1. Did the trial court abuse its discretion in refusing to lift a statutory stay for a claimant who had not complied with the administrative claim procedure mandated by statute and whose claim was already on appeal to this Court in a case to which the statutory stay was not applicable?

2. Was it arbitrary, capricious or contrary to law for the trial court to affirm the Receiver's denial of a claim for contribution that has not yet arisen and that earlier had been dismissed by judicial order?

3. Did Utah's Takeover Act, which provides a comprehensive administrative procedure for filing claims against a closed bank and provides for timely judicial review of the administrative decisions, deny appellants due process and access to the courts?

DETERMINATIVE AUTHORITIES

1. Utah Code Ann. §7-2-1 et seq., reproduced at A-1 of the Addendum.

STATEMENT OF THE CASE

This is the Court's first opportunity to interpret Chapter Two of Title Seven of the Utah Code (the "Takeover Act") which governs the closing of insolvent state-chartered banks. Utah Code Ann. § 7-2-1 et seq. The Takeover Act establishes procedures for the Utah Commissioner of Financial Institutions, or a receiver he appoints, to reorganize or liquidate insolvent banks. Appellant Fire Insurance Exchange (the "Insurer") challenges the Takeover Statute as applied to its claim for contribution against an insolvent bank, Rocky Mountain State Bank (the "Bank"), when the claim had been dismissed in district court and was on appeal to this Court at the time the Bank was closed.

In February 1983, the Crookstons, two borrowers whose home had collapsed, were suing the Bank and the Insurer for negligence, intentional torts, and breach of contract. **[R 142-48]**[1/]. The Bank and the Insurer had cross-claimed against each other for contribution as joint tortfeasors.

1/ The format for citations to the Record is **[R ___]**.

The Crookston case was set for a May 26, 1987, jury trial before Judge Frederick. On May 21, 1987, the Crookstons settled with the Bank and the Bank immediately moved for summary judgment on the Insurer's cross-claim for contribution. **[R 130]**. The Bank explained that the Crookstons had abandoned their negligence claims against all parties and argued that the Insurer could maintain no claim for contribution with respect to intentional torts. Brief of Appellant ("Insurer's Brief") pp. A 24-25.

Judge Frederick heard the motion for summary judgment on May 26 before the jury was impaneled and granted it on the basis that no right of contribution exists among intentional tortfeasors under the applicable Utah statute. **[R 130]**. The Insurer objected to the timing of the hearing and appealed from the Order granting summary judgment on the cross-claim. That appeal, Case No. 870252 ("the Cross-Claim Appeal") presents the Insurer's argument about contribution among intentional joint tortfeasors. Insurer's Cross-Claim Brief pp. 22-36.

Following trial in the Crookston case, the jury returned a verdict of $4,800,000 against the Insurer. The Insurer appealed that verdict and again raised the issue of contribution among intentional joint tortfeasors in Case No. 880034 (the "Jury Verdict Appeal"). Insurer's Jury Verdict Brief pp.

101-114. This Court consolidated the Cross-Claim Appeal and the Jury Verdict Appeal on the Insurer's ex-parte application, but reversed that ruling on April 18, 1988, after a hearing. **[R 131-32].**

Shortly after the Crookston trial, the Bank became insolvent. **[R 130].** On August 28, 1987, the Commissioner of Financial Institutions petitioned for an order approving his taking possession of Rocky Mountain State Bank pursuant to Utah Code Ann. §7-2-1 (1986) and §7-2-2 (1987). **[R 2].** By sheer coincidence, the Petition came before Judge Frederick. After a hearing, Judge Frederick approved the actions of the Commissioner. **[R 8].**

By statutory authority, the Commissioner immediately appointed the FDIC as Receiver of the Bank. **[R 92-96].** The FDIC Receiver entered into a Purchase and Assumption Agreement with Citibank Utah whereby Citibank purchased the Bank's "good" assets and assumed all of its deposit liabilities. **[R 13-19].** The FDIC in its corporate capacity purchased from the FDIC Receiver the remaining "bad" assets of the bank for $41,000,000. This amount was equal to the deposit liabilities assumed by Citibank, less the value of the assets purchased by Citibank and less a premium of $700,000 paid by Citibank for the Bank's good will. FDIC Receiver paid the $41,000,000 to Citibank, and the district court

approved the three-cornered transaction after the hearing on August 28, 1987. **[R 89-91]**.

As required by Utah Code Ann. §7-2-7 (1986), the district court Order of August 28, 1987 also ordered a stay of commencement or continuation of any judicial proceeding against the Bank. The stay applied to the Cross-Claim Appeal since the Bank was a named party. During the time the Cross-Claim Appeal was consolidated with the Jury Verdict Appeal, the stay applied to both actions.

The Cross Claim Appeal presents two arguments. One is the 14-page argument about contribution which is presented word for word in the Jury Verdict Appeal and in this appeal as well. Insurer's Cross Claim Brief pp. 22-36; Insurer's Jury Verdict Brief pp. 101-114. The other argument is that the Insurer had insufficient time to respond to the Bank's motion for summary judgment. Insurer's Cross-Claim Brief pp. 10-21. That argument is also raised verbatim in the Jury Verdict Appeal. Insurer's Jury Verdict Brief pp. 89-100.

The Receiver posted the notice of taking as required by §7-2-6(1), **[R 97-98]**, and published the Notice to Creditors required by §7-2-6(2). **[R 195-96]**. The notice advised all persons with a claim to present their claims to the Receiver

pursuant to §7-2-6 which mandates that all claims against a closed bank go through administrative process.

No notice by mail was sent to the Insurer since its name did not appear on the Bank's records as a creditor of the Bank and since the FDIC Receiver had no actual knowledge of the pendency of the Cross-Claim Appeal. **[R 183]**. Section 7-2-6(2) requires mailing of notice only to persons whose names appear as depositors or other creditors upon the books and records of the institution.

On March 9, 1988, the Insurer moved to lift the statutory stay of the Cross-Claim Appeal. **[R 115]**. The Receiver opposed lifting the stay on the ground that the Insurer's claim for contribution should first be filed with the Receiver pursuant to §7-2-6. **[R 184-184]**. Judge Frederick, sitting as the §7-2-2 supervisory court, denied the Insurer's motion to lift the stay on May 16, 1988. **[R 211-212]**. Judge Frederick's Order cited the fact that the Supreme Court had de-consolidated the Jury Verdict and Cross-Claim Appeals. Id. The district court was responsive to the Insurer's desire to get its contribution argument before the Supreme Court. **[R 588 pp. 12-14]**. When the two appeals were no longer consolidated, the Jury Verdict Appeal, containing the contribution argument, was not affected by the stay.

In its motion to lift the stay, the Insurer claimed that its Cross-Claim Appeal constituted a claim with the Receiver. The Receiver notified the Insurer that an appeal does not constitute a claim as required by §7-2-6 and that any claim evidenced by the appeal was denied because the claim had not yet arisen and because a district court order had dismissed the claim. **[R 542-43)**. The Receiver also advised the Insurer in writing of its right to appeal to the district court under Section 7-2-6(9).

On May 16, 1988, the Insurer filed a §7-2-6 claim with the Receiver. **[R 206-7]**. The Insurer asserted that it "may be entitled to a right of contribution against Rocky Mountain State Bank" and that the Bank "may become obligated to pay Fire Insurance Exchange in the future." (Emphasis added). **[R 206]**.

The Receiver denied the claim because no claim for contribution had arisen and because a district court order had dismissed the claim. **[R 539-43]**. The Receiver also advised the Insurer that objections to denial would be heard at a Section 7-2-6(9) hearing set for August 1, 1988. After that hearing, the court affirmed denial of the claim **[R 547-8]**, and the Insurer appealed the order denying the claim as well as the order denying the motion to lift the statutory stay. **[R 551]**. The Insurer

did not move to lift the stay after it complied with the administrative procedure.

SUMMARY OF ARGUMENT

The Insurer appeals from two orders issued pursuant to the Takeover Act (Utah Code Ann. §7-2-1 et seq.): One order maintains a statutory stay and the other upholds the Receiver's decision to deny the Insurer's claim for contribution.

The court did not abuse its discretion when it found no cause to lift a stay in circumstances where the claimant had not complied with administrative process mandated by statute and where the claimant's issue was already on appeal to this Court in the Jury Verdict Appeal. When Rocky Mountain State Bank was closed, the Takeover Act changed the procedure for resolving the Insurer's claim for contribution, but the Insurer's substantive rights are preserved in this appeal and in the Jury Verdict Appeal. Hearing three appeals instead of two can only add to this Court's burden and cannot give the Insurer any relief beyond that which it has sought in the two appeals this Court will hear.

The Insurer's claim for contribution was correctly denied on the basis that it had not yet arisen and that there was a prior judgment dismissing the claim. The rights and liabilities of an insolvent bank and its creditors are fixed at the date

of insolvency and no additional rights can be created after court determination of a bank's insolvency.

Denial of the Insurer's claim for contribution, pursuant to the Takeover Act, did not deny due process or access to the courts. The Takeover Act provides administrative due process and prompt judicial review of administrative decisions.

ARGUMENT

I

THE TRIAL COURT EXERCISED SOUND DISCRETION IN FINDING NO CAUSE TO LIFT THE STAY

The Takeover Act provides a comprehensive scheme for closing failed banks and for filing and processing claims of interested parties. The statutory scheme includes an automatic stay of any action against the failed bank and allows modification of the stay for cause shown.

The district court's order denying the Insurer's Motion to Lift the Stay stated that no cause had been shown to lift the stay. This Court reviews the district court's mixed finding of fact/conclusion of law of "no cause" by an abuse of discretion standard. Marqulies By and Through Marqulies v. Upchurch, 696 P.2d 1195, 1200 (Utah 1985).

The district court properly exercised its discretion in finding no cause to lift the stay because the Insurer had not

made an administrative claim for contribution required by §7-2-6 and because the issue of contribution was already before this Court in the Jury Verdict Appeal. The stay issue is now moot because, although the Insurer eventually did comply with administrative process, it did not seek to lift the stay following compliance.

A. THE STATUTORY STAY CANNOT BE LIFTED FOR A CLAIMANT WHO HAS NOT COMPLIED WITH THE STATUTE

The Takeover Act provides that "the court may, for cause shown, terminate, annul, modify, or condition" the automatic stay. Utah Code Ann. §7-2-7(1) (1986). Cause to lift the stay must be reviewed in light of the purpose for imposing the stay. The statutory stay, like the stay in bankruptcy, is imposed to compel compliance with the statutory scheme, which includes a requirement that all claimants file their claims with the Receiver. Utah Code Ann. §7-2-6 (1987). The Insurer asked the court to lift the stay even though it had not filed the required claim, and the Receiver opposed lifting the stay because the Insurer had failed to file the required claim.

The closing of Rocky Mountain State Bank in August 1987 changed the Insurer's procedural rights much as a debtor's filing for bankruptcy changes a creditor's procedural rights. When the Bank was closed for insolvency, the Takeover Act stayed

litigation and substituted an administrative procedure for consideration of claims, with a right to judicial review of the Receiver's allowance or disallowance of a claim. Utah Code Ann. §7-2-6(9) (1987).

When statutes change procedure after initiation of a suit, if the changes "do not enlarge, eliminate, or destroy vested or contractual rights," they apply "not only to future actions, but also to accrued and pending actions as well." Pilcher v. State Department of Public Services, 663 P.2d 450, 455 (Utah 1983); State Department of Social Services v. Higgs, 656 P.2d 998, 1000 (Utah 1982). Clearly a statute already in effect, like the Takeover Act, legitimately changed the Insurer's procedural rights. The Insurer's substantive rights were not changed because it had no vested right to contribution when the Bank closed. See Unigard Insurance Co. v. City of LaVerkin, 689 P.2d 1344 (Utah 1984).

Judge Frederick refused to lift the stay, in part, because the Insurer had not exhausted its administrative remedies. After the Insurer complied with the administrative claim procedure, it did not petition to court to lift the stay. Thus, it is in no position to complain about the original refusal to lift the stay.

B. THERE IS NO CAUSE TO LIFT A STAY WHEN THE ISSUE STAYED IS ALREADY ON APPEAL

The Insurer argues that the Cross-Claim Appeal should go forward so that it can appeal the question of whether it has a right of contribution. In his Order denying the motion to lift the stay, Judge Frederick cited the fact that the Supreme Court, upon hearing, revoked consolidation of the Cross-Claim Appeal and the Jury Verdict Appeal. [R 209]. The Judge concluded that if the Insurer had one appeal pending on the question of whether contribution exists between intentional tortfeasors, there was no cause to lift the stay and allow a second appeal of the issue.

Since the Jury Verdict Appeal has been briefed and remains only to be argued, the Insurer will get a ruling from the Supreme Court on the contribution-among-joint-tortfeasors question. Lifting the statutory stay to allow the Insurer to proceed with the Cross-Claim Appeal would not give the Insurer any relief it has not requested in the appeal already pending. If the requested judicial relief cannot affect the rights of the litigants, this Court has held the case moot. Jones v. Schwendiman, 721 P.2d 893, 894 (Utah 1986).

As noted, the Jury Verdict Appeal presents exactly the same 14-page argument on the Insurer's right to contribution that is presented in the Cross-Claim Appeal and again in this case.

The contribution argument is properly before the Court in the Jury Verdict Appeal since the merits were argued to the trial court. However, in this case, the merits of the argument were not raised below.

The Insurer's Brief implies that the merits were presented below as a basis for lifting the stay:

> Fire Insurance Exchange, in seeking to have the stay lifted below, represented to the Court that its research demonstrated that the Court's ruling was in error on a critical substantive issue, i.e., whether contribution exists between intentional tortfeasors. (R. 588).

Insurer's Brief, p. 11. However, the Insurer's citation to the Record at 588 is simply the Insurer telling the Court it wants to appeal the question of whether contribution exists between intentional tortfeasors; it does not include any representation about research or about the merits of the issue. **[R 588 pp. 1-24].**

Since the merits of the question of contribution were not mentioned in the pleadings, at the hearing on the Motion to Lift the Stay or in the court's order, that issue is not properly before the Court in this Appeal and the Court should simply disregard Section I-A of the Insurer's brief. Bundy v. Century Equipment Co., Inc., 692 P.2d 754, 758 (Utah, 1984). However, for the record, the FDIC notes a fundamental flaw in the Insurer's contribution argument.

1. The Insurer Has No Clear Right of Contribution Under Utah Law

The Insurer labels as "clearly erroneous" the trial court's conclusion that Utah Code Ann. §78-27-39 (as in effect from 1973-1986) excludes intentional tortfeasors. However, the Insurer presents no statement from Utah statute or case law that Utah's former Comparative Negligence Statute, of which §78-27-39 was a part, was intended to apply to intentional tortfeasors.

The Insurer's analysis ignores the title of the act which reads as follows:

> **Title of Act.**
> An act relating to actions for the recovery of damages in actions based on negligence or gross negligence; removing contributory negligence as a bar to any recovery under certain circumstances; providing for the diminishing of any recovery in proportion to the negligence of the person seeking recovery; providing for separate judgments as to damages in proportionate negligence; providing for contribution among joint tortfeasors; providing for the release of one or more joint tortfeasors without releasing them all; and providing for the effect of such releases on other joint tortfeasors. L. 1973 Ch. 209. (Emphasis added.)

Since by its terms the act relates only to actions based on negligence, the Insurer's citations from other jurisdictions whose statutes are not so limited and from the Uniform Contribution Among Tortfeasors Act are not persuasive.

The Insurer quotes from Krukiewicz v. Draper, 725 P.2d 1349, 1351 (Utah 1986) a passage that calls the negligence/contribution act by its official name: the "Utah Comparative Negligence Act," (emphasis added), but offers no explanation why the act's name excludes intentional tortfeasors.

C. THE INSURER'S DESIRE TO KEEP THE BANK IN THE UNDERLYING ACTION PROVIDES NO CAUSE FOR LIFTING THE STAY.

The Insurer confuses its general sense of ill usage with a right to specific relief when it argues in this appeal that it has a right to require the Bank to remain as a defendant in the underlying action. Neither of the orders from which the Insurer appeals in this case addresses the question of whether the Bank should have remained a defendant in the underlying action.

The refusal to lift the statutory stay was based on the Insurer's failure to comply with the §7-2-6 claims procedure. The denial of the Insurer's claim for contribution was based on an existing order and on the fact that the Insurer had not paid more than a prorata share of a judgment at the time the Bank was closed. Neither of the district court's orders has anything to do with whether the same jury that decides an underlying action should decide third-party claims.

The Insurer properly raised the question of a right to have all the facts before the same tribunal in its Jury Verdict Appeal. Insurer's Jury Verdict Brief pp. 115-116. But by reversing either the order upholding the stay or the order denying the claim, this Court would have no impact on the question of whether liability of the Bank to the Insurer should be decided in the underlying action.

The Insurer states that although there is no Utah case on point, it has a "vested right" to retain the Bank as a party Defendant in the underlying action. Insurer's Brief p. 26. Contrary to the Insurer's assertion, a Utah case holds exactly the opposite. A party cannot claim a vested right in a claim that does not yet exist; and this Court has held:

> If one named as a defendant tortfeasor impleads another alleged joint tortfeasor, the defendant in the initial action does so, not on the ground that a claim for relief then exists against the third-party defendant, but on the ground that the third-party defendant "may be liable" to the defendant in the principal action.

Uniqard Insurance Company v. City of LaVerkin, 689 P.2d 1344, 1346 N.2 (Utah, 1984).

This Court has also held that the Comparative Negligence Act does not "mandate that the plaintiff must obtain jurisdiction over all the tortfeasors and bring them to trial so that

the proportion of fault of each may be there determined." Cruz v. Montoya, 660 P.2d 723, 728 (Utah 1983).

Although the Insurer claims a "vested" right, the authorities the Insurer cites refer only to convenience and judicial efficiency. Insurer's Brief pp. 26-34. No case uses the word "vest." The Insurer attempts to convert Rule 14 of the Utah Rules of Civil Procedure -- which permits a third-party claim to be decided together with the underlying claim -- into a vested right to contribution. The authorities cited by the Insurer, however, specifically hold that impleader "merely accelerates the determination of liability and does not have the effect of enlarging any substantive rights." Patten v. Knutzen, 646 F. Supp 427, 430 (D. Colo. 1986); C. Wright and A. Miller, Federal Practice and Procedure, §1448, pp. 263-65. (1971) (emphasis added).

Rule 14 may allow accelerated determination of liability if the third-party plaintiff can satisfy the court that the alleged joint tortfeasor "may be" liable to the third-party plaintiff. Rule 14 does not give a third-party plaintiff a vested right of contribution.

D. DUE STATUTORY NOTICE WAS PROVIDED AND THERE WAS NO WAIVER OF THE STATUTORY STAY.

The Insurer alleges as "cause" to lift the stay the theory that counsel for the Bank waived the stay by failing to

promptly notify the Insurer of the stay. Insurer's Brief p. 35. That contention has no merit. The stay is mandated by statute and cannot be waived by an insolvent Bank's counsel. The Receiver, not Bank counsel, relied on the stay and opposed the Insurer's motion to lift the stay in order to protect the Receiver's rights, duties and obligations in administering the Bank under Utah law.

Once the insolvent Bank was closed and the FDIC was appointed as Receiver, the rights and obligations of the closed bank were the responsibility of the Receiver, not of the attorneys employed in the Crookston case prior to the Bank's closing by the Bank's liability insurance carrier. The Receiver had no knowledge of the Cross-Claim Appeal until the Insurer filed its motion to lift the stay. It then opposed lifting the stay. That conduct is no "waiver" of the statutory stay.

E. THE INSURER PRESENTS THE COURT WITH THE "WHOLE PICTURE" IN ITS JURY VERDICT APPEAL.

The Insurer argues that it may suffer prejudice in having to present its claims piecemeal. Again, neither order appealed from offers any relief from piecemeal presentation. Furthermore, the Insurer's Jury Verdict Appeal raises all the issues addressed in the Cross-Claim Appeal. What the Insurer is really insisting on is a right to raise every claim three times.

The Insurer's desire to present the "whole picture" thrice to this Court gives no legitimate cause to lift the stay.

II

THE RECEIVER PROPERLY DENIED THE INSURER'S CLAIM FOR CONTRIBUTION AGAINST THE BANK'S ASSETS

The Insurer appeals from the district court's order affirming disallowance of its §7-2-6 claim for contribution against the Bank's assets in the possession of the Receiver. Since the Administrative Procedure Act does not apply to actions or review of actions under the Takeover Act, Utah Code Ann. §63-46b-1(2)(h), the Takeover Act itself prescribes the scope of review of the order affirming the Receiver's denial of the Insurer's claim for contribution. The FDIC as Receiver stands in the shoes of the Commissioner, Utah Code Ann. §7-2-9(1) (1987), and the court "may not overrule a determination or decision of the Commissioner if it is not arbitrary, capricious, fraudulent, or contrary to law."[2/] Utah Code Ann. §7-2-2(4) (1987).

The Insurer acknowledges that before the Bank's insolvency, Judge Frederick entered an order denying contribution among intentional tortfeasors. The Insurer also admits in the

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2/ The 1989 Amendments to § 7-2-6(9) (SB185) expressly made that criterion applicable to review of decisions of a receiver allowing or disallowing claims. Utah Code Ann. § 7-2-6(9)(c), effective May 1, 1989.

very language of its claim filed with the Receiver that its claim for contribution is one to which it "**may** be entitled" and that the Bank "**may** become obligated to pay Fire Insurance Exchange in the future." **[R 206]**. In its Brief to this Court, the Insurer concedes the claim "might have technically remained in an inchoate state." Insurer's Brief p. 38. In light of these admissions, the Insurer cannot claim the Receiver's decision to deny the claim was arbitrary, capricious or contrary to law.

A. RES JUDICATA REQUIRED THE RECEIVER TO DENY THE INSURER'S CLAIM FOR CONTRIBUTION.

The only legal precedent in Utah that addresses the question of contribution among intentional joint tortfeasors is the district court's 1987 ruling that there is no contribution among intentional tortfeasors. The Receiver correctly cited that decision as a basis for denying the Insurer's claim for contribution against an alleged intentional joint tortfeasor. The Receiver made the only decision it could make in light of the law that governed when it made its decision.

When summary judgment adjudicates a claim on its merits, the judgment invokes the doctrine of res judicata. Makin v. Liddle, 696 P.2d 918,919 (Idaho App. 1985); Seeborg v. General Motors Corp., 588 P.2d 1100, 1102 (Or. 1978); Restatement (Second) of Judgments §19, Comment (g) (1980). Furthermore, even if

a judgment is later overruled by an appellate court, it is nonetheless conclusive while it stands. El Paso Natural Gas v. State, 599 P.2d 175, 178 (Ariz. 1979); C. Wright and A. Miller, Federal Practice and Procedure, §4433 (1971).

Thus Judge Frederick's order, which granted summary judgment and ruled that there is no right of contribution among intentional tortfeasors, is res judicata on the question unless and until this Court reverses the ruling.

B. NO RIGHT OF ACTION FOR CONTRIBUTION HAS ARISEN

The Utah Comparative Negligence Act in effect when the underlying tort was committed provided:

> (1) The right of contribution shall exist among joint tortfeasors but a joint tortfeasor shall not be entitled to a money judgment for contribution until he has, by payment, discharged the common liability or more than his prorata share thereof.

Utah Code Ann. §78-27-39(1) [repealed 1986].

This Court has interpreted that passage as creating a new cause of action, but only in a tortfeasor who has already paid more than his prorata share of a common liability. Brunyer v. Salt Lake County, 551 P.2d 521, 522 (Utah 1976). The Brunyer Court held that a claimant had no right to contribution because that claimant had not discharged more than a prorata share of a common liability before enactment of the Comparative Negligence

Act which established the right to contribution. Id. The act does not create a cause of action for contribution in a tortfeasor, like the Insurer, who has not paid any portion of a judgment and who has not even obtained a judgment that the bank is jointly liable.

The FDIC as Receiver correctly denied the Insurer's claim for contribution because "irrespective of when the underlying tort action arises, a claim for contribution 'arises' only when a defendant meets the conditions specified by the Comparative Negligence Act" Citing Unigard Insurance Co. v. City of Laverkin, 689 P.2d 1344, 1346 (Utah 1984). [R 539-40]. Unigard makes it clear that the right of contribution does not arise when the tort occurs, but rather arises "to rectify the inequity resulting when one tortfeasor pays more than his share of the common liability." 689 P.2d at 1346. No such inequity has occurred in this case.

The Unigard Court explained that when one tortfeasor impleads another alleged joint tortfeasor, he does so "not on the ground that a claim for relief then exists against the third-party defendant, but on the ground that the third party defendant 'may be liable'" to the tortfeasor. Id. at N.2. (Emphasis added).

The Insurer admits its right to contribution "might have technically remained in an inchoate state" pending its payment of more than its prorata share of the Crookston judgment. Insurer's Brief p. 38. But payment of the Crookston judgment is only one of many steps separating the Insurer from a right of contribution. At this stage, the amount of a final judgment against the Insurer is still uncertain. Second, this Court must overturn the district court's ruling that intentional joint tortfeasors are barred from contribution. Then the Insurer must persuade a jury that the Bank committed some intentional tort in common with the Insurer, even though the tort plaintiff asserted no claim against the Bank. The Insurer has no vested claim against the Bank.

C. NO RIGHT OF ACTION CAN BE CREATED AFTER A BANK'S INSOLVENCY

The Receiver's notice of denial further pointed out, "It is well settled that the rights and liabilities of Rocky Mountain State Bank and its creditors are fixed at the declaration of insolvency and no additional rights can be created after such insolvency." Citing FDIC v. McKnight, 769 F.2d 658, 661 (10th Cir. 1985). **[R 540].**

In the McKnight case the Tenth Circuit determined the rights of holders of cashier's checks issued shortly before the bank was closed:

> The seminal point is the closing of Penn Square. That event not only triggered the liquidation process, but also cast in stone the relationship of defendants to the bank. "It is well settled that the rights and liabilities of a bank and the bank's debtors and creditors are fixed at the declaration of the bank's insolvency."

769 F.2d at 661, Citing American National Bank of Jacksonville v. FDIC, 710 F.2d 1528, 1540 (11th Cir. 1983).

American National Bank involved claims to assets of a closed state bank. The Eleventh Circuit held that the claimant's "attempt to rely on events subsequent to the bank's closing in support of its claim of ownership to the escrow fund must fail since the rights of the parties were frozen on April 13, 1970, when the bank's doors were shut to business." 710 F.2d at 1540-41.

The reason for freezing rights with respect to national banks is based on 12 U.S.C. §194 which requires payment of claims on a prorata basis. If claims that had not yet arisen could be recognized, the Receiver could not make any interim prorata payments to creditors until all the uncertainties and contingencies were resolved.

A similar reason applies to Utah chartered banks. The FDIC as Receiver has authority under federal law, 12 U.S.C. §1823, and state law, §7-2-9(2)(b), to enter into purchase and assumption agreements whereby another bank assumes the closed

bank's deposit and other liabilities. Such an arrangement would not be feasible if claims that had not yet arisen could be asserted. Under federal law, 12 U.S.C. §1823, the FDIC must make a decision at the time of closing whether a purchase and assumption procedure or a straight liquidation is preferable. Such a decision must be made with great speed, usually overnight, in order to preserve the going concern value of the failed bank and avoid interruption in banking services. Langley v. FDIC, 484 U.S. ___, 98 L.Ed.2d 340, 347 (1987).

In addition, under §7-2-16, a receiver may declare interim dividends to proven claimants. No such procedure could be followed if claimants could assert claims based on post-closing events.

The Utah legislature in the original enactment of §7-2-6 did not expressly codify the well-settled rule that rights are frozen on the date of takeover. However, the 1989 legislature clarified its position: "The rights of claimants and the amount of a claim shall be determined as of the date the Commissioner took possession of the institution under this Chapter." Utah Code Ann. §7-2-6(4)(c) (1989). The Receiver's application of the well-settled rule to the Insurer's claim has been ratified by the Utah legislature.

III

UTAH'S TAKEOVER ACT PRESERVES THE INSURER'S CONSTITUTIONAL RIGHTS TO DUE PROCESS AND ACCESS TO THE COURTS

Point II of the Insurer's Brief contends that implementation of the Takeover Act unconstitutionally deprived it of due process under the Federal and State Constitutions and violated Article I, Section 11 of the Utah Constitution as to access to the courts.

A. CONSTITUTIONAL ISSUES ARE NOT PROPERLY BEFORE THIS COURT

An appellant may not raise before this Court issues it did not raise in district court. Bundy v. Century Equipment Co. Inc., 692 P.2d 754, 758 (Utah 1984). No reference to due process was made in any of the proceedings, and the Insurer did not refer to Section 11 in asking the district court to reverse the Receiver's decision on the claim for contribution.

The constitutional issues on which the Insurer now relies were given only cursory presentation to the Court below, and the Court made no findings of fact or conclusions of law on the constitutional issues. In such circumstances, this Court should not consider the appeal. Turtle Management, Inc. v. Haggis Management, Inc., 645 P.2d 667 at 672.

Limited reference to the constitutional doctrines in the district court, without any analysis before that court, does not meet this Court's standards for appellate review. State v. Johnson, 771 P.2d 362 (Utah App. 1989); James v. Preston, 746 P.2d 799, 802 (Utah App. 1987). Nevertheless, the FDIC has briefed the issue for this Court's consideration.

B. THE TAKEOVER ACT PROVIDES REASONABLE PROCEDURES FOR CLAIMS AGAINST A CLOSED BANK

The Takeover Statute (Utah Code Ann. §7-2-1 et seq.) establishes the following reasonable remedies by due course of law:

(1) Takeover of insolvent depository institutions by the Commissioner of Financial Institutions (§7-2-1);

(2) Designation of a court to have jurisdiction over the liquidation of the institution and the acts of the Commissioner and any receiver or liquidator appointed by the Commissioner (§7-2-2);

(3) Appointment of a receiver or liquidator with appropriate powers and duties (§§7-2-9, 7-2-10 and 7-2-12);

(4) Notice of the taking, notice to file claims, the procedure for handling claims and judicial review of determinations by the receiver in allowing or disallowing claims (§7-2-6);

(5) Stay of court proceedings against the institution to enable the receiver to marshal the assets of the closed bank and to provide for an orderly liquidation without interference from litigation (§7-2-7); and

(6) Establishment of priority for the payment of claims against the institution (§7-2-15).

Subject only to secured claims, administrative expenses, and unpaid wage claims for the 90-day period prior to the closing, depositors' claims are given first priority by §7-2-15. Since the FDIC is the insurer of these claims, §7-2-9(2) authorizes the Commissioner to appoint the FDIC as receiver or liquidator. The receiver may enter into purchase and assumption agreements with another financial institution to allow depositors uninterrupted access to their accounts.[3/]

3/ Following the Rocky Mountain State Bank purchase and assumption transaction, the receiver has no assets to meet the claims of Bank creditors. Whether any assets will be available to pay claims subordinate to depositor claims as defined in § 7-2-15 depends on the success of the FDIC in liquidating the assets it purchased from the receiver to carry out the purchase and assumption transaction. A similar procedure has been followed in the other ten Utah banks closed since 1984, involving over $100,000,000 advanced by the FDIC in its corporate capacity as insurer of the closed banks' deposit liabilities. This procedure has protected all deposits, even those exceeding the $100,000 insurance limit.

The Takeover Act's above comprehensive scheme offers due process and full court access as further explained below.

C. THE TAKEOVER ACT SATISFIES DUE PROCESS AND OPEN COURT REQUIREMENTS

Between March 9, 1988, when the Insurer sought to lift the stay and September 2, 1988, when this appeal was filed, the Insurer filed its administrative claim, received an administrative decision, and had two full hearings in district court. The Insurer received due process and full access to the courts.

1. The Insurer Obtained Timely Judicial Review of Administrative Process

In Coit Independent Joint Venture v. FSLIC, 57 U.S.L.W. 4347 (March 21, 1989), the United States Supreme Court reviewed the validity of an administrative procedure established by regulations of the Federal Home Loan Bank Board for handling claims against insolvent savings and loan associations. The FSLIC, insurer of savings and loan deposits, had acted as receiver. The Supreme Court found that mandating an administrative procedure for the processing of claims against the assets of a closed savings and loan association was a reasonable exercise of the Federal Home Loan Bank Board's authority. It concluded the Board could reasonably determine that FSLIC as receiver "simply cannot perform its statutory function unless it is notified of the

entire array of claims against a failed association's assets and has a reasonable period of time to make rational and consistent judgments regarding those claims." 57 U.S.L.W. at 4353.

The Supreme Court found the FSLIC claims procedure to be inadequate only insofar as the regulations failed to provide a "clear and reasonable time limit" on FSLIC's consideration of claims, thus unreasonably denying claimants their day in court. 57 U.S.L.W. 4347 at 4353.

In contrast, Utah's §7-2-6 clearly establishes a time limit for the receiver to adjudicate claims. The receiver must act on claims within 180 days after final publication of notice. Utah Code Ann. §7-2-6(4) (1987). The receiver must give notice of its determination within 30 days after determination, and if a claimant has not received notice of disallowance within 210 days of the date of final publication of notice, the claim is considered allowed. Id. The district court reviews the receiver's decision. §7-2-6(9) (1987).

In the case at bar, the Insurer had a court determination of the validity of its claim within 90 days of its date of filing. Part of the 90 days was spent briefing and arguing the merits of the claim before the district court.

When the district court approved denial of the Insurer's claim, it rendered moot its earlier order refusing to

lift the statutory stay pending administrative resolution of the Insurer's claim by the Receiver. The Insurer's claim for contribution has been heard by the Receiver and the Receiver's determination has been reviewed by the district court and is now before this Court on appeal.

2. The Insurer's "Right" of Contribution is not an Accrued, Individual Right Protected by the Constitution

The Insurer cites Berry v. Beech Aircraft Corp., 717 P.2d 670 (Utah 1985), to support its assertion that the Takeover Act denies it due process and access to Court. However, Berry specifies that the constitutional protections operate only "once a cause of action . . . accrues to a person by virtue of an injury to his rights. . . ." Id. at 676. The "rights" protected by the Open Courts provision are "injuries done to the substantive interests of person, property, and reputation." Id. at N.4.

In Berry, the substantive interest at issue was the Plaintiffs' right to bring a wrongful death action. By contrast, the Insurer claims constitutional protection attaches to a "right" of contribution which has not accrued, arisen, or vested and which is not a fundamental personal or property right but is merely designed to adjust the economic burden among tortfeasors once common liability has been adjudicated.

3. The Takeover Act Provides Effective, Reasonable Alternative Remedies for Vindication of Any Constitutional Interest

Before a constitutional remedy can be abrogated, Berry requires either an effective, reasonable alternative remedy or a need to eliminate a clear social or economic evil. Id. at 680. The first question is whether any constitutional remedy has been abrogated in this case.

The Insurer contends that the Takeover Act denied its right to maintain an action for contribution against the Bank. However, the Insurer has no such right because it has not paid a common liability. Furthermore, it was first the district court--not the Takeover Act--that denied the claim for contribution, and the Receiver simply followed legal precedent. The Insurer is characterizing as a constitutional complaint what is merely the Insurer's disagreement with the district court's decision. The Insurer has enjoyed open courts and due process; it simply does not like the outcome of the process.

Assuming, for purposes of argument, that some remedy has been abrogated, the Takeover Act provides the effective, reasonable remedies by due course of law required by Berry. The prompt administrative decision followed by prompt judicial review that the Insurer received is by definition effective, reasonable and due course of law.

As noted above, the Coit decision found the only defect in FSLIC's procedure to be a lack of reasonable time limit for

completion of the administrative procedure. That defect does not exist in the Utah statutory scheme.

4. The Takeover Act Eliminates a Clear Economic Evil.

The "social and economic evil" analysis outlined in Berry is applicable only "...if there is no substitute or alternative remedy provided. . . ." 717 P.2d at 680. Again, assuming for purposes of argument that the Insurer had a constitutional remedy before the Bank closed, the effective substitute remedy provided by the Utah statutory procedure in §7-2-1 et seq. has been followed to the letter. The Insurer had its day in court at the district court level and is now appealing that decision.

Although there is no need to reach the "social or economic evil" test, the Takeover Act eliminates economic evils. The United States Supreme Court recognized in Coit "the social or economic evil" of litigation against the receiver without affording the receiver notice "of the entire array of claims against a failed association [bank's] assets and reasonable period of time to make rational and consistent judgments regarding those claims." 57 U.S.L.W. 4347 at 4353.

Another economic evil eliminated by the statutory stay of litigation against the Receiver is the wasting of the Receiver's assets. The cost of defending litigation against the Receiver constitutes administrative expense. Administrative

expenses have priority over deposit and other claims against the Bank. Utah Code Ann. §7-2-15(1)(b) (1987). Thus, absent the stay, assets of the insolvent bank would be consumed in defending litigation aimed at establishing claims which the legislature has determined have a lesser priority than depositors' claims.

With respect to the "social and economic evil" test, the Insurer states that "the Insurer understands and admits that the bank represents that it has no assets available to satisfy any portion of the $4.8 Million judgment entered in the related underlying action." Insurer's Brief p. 41. It is true that the Receiver lacks Bank assets because the purchase and assumption agreement with Citibank was necessary to meet depositor claims under §7-2-15. However, if the Insurer is found to be entitled to a claim against the closed Bank's assets, the Insurer would receive a Receiver's certificate evidencing the claim.

The Receiver's certificate would be payable, subject to the priorities set by §7-2-15 and the provisions of the agreement whereby the FDIC purchased the "bad" assets of the bank not purchased by Citibank, from any recoveries by the FDIC on the closed Bank's assets. That would be true of all claims filed and approved by the Receiver under §7-2-6. The imposition of the stay until the Insurer filed its §7-2-6 claim in May 1988 in no way affected that result.

The Takeover Act provides constitutional due process and access to the courts. Its implementation by the Receiver in this case did not deprive the Insurer of any constitutional right.

CONCLUSION

If this Court upholds Judge Frederick's ruling on contribution among intentional joint tortfeasors when it considers the Jury Verdict Appeal, the Insurer has no claim for contribution and no basis for appeal in this case or in the Cross-Claim Appeal. If the Court allows contribution among intentional tortfeasors, the orders appealed from in this case were still correct when made.

The FDIC asks the Court to affirm the Order refusing to lift the stay because it was an appropriate exercise of the court's discretion and to affirm the Order affirming the Receiver's disallowance of claim because it was not arbitrary, capricious or contrary to law.

DATED this 30th day of May, 1989.

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CERTIFICATE OF HAND DELIVERY

I hereby certify that on the 30th day of May, 1989, four true and correct copies of the foregoing were hand delivered to:

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ADDENDUM

DETERMINATIVE AUTHORITY

(2) Notwithstanding Subsection (1), the commissioner, any supervisor, or any examiner of the department may:

(a) have and maintain savings, transaction, or other accounts, or certificates and deposits in any financial or depository institution in the state, or a share or share draft account in any credit union in the state, or a thrift savings account or own any thrift certificates of deposit in any industrial loan corporation, or be a lessee of a safe deposit box on the same terms and conditions available to the public generally;

(b) be indebted to a savings and loan association, bank, or other institution under the supervision of the department upon (i) a mortgage loan upon the mortgagor's own home; and (ii) an installment debt transferred to an institution in the regular course of business by a seller of consumer goods; and

(c) continue to receive payments under a regularly established pension plan of general application for fully retired employees of an institution under the supervision of the department.

(3) Notwithstanding Subsection (1) any supervisor or examiner may be indebted to any institution under the supervision of the department if: (a) the loan is obtained under the same circumstances, conditions, and terms available at the time to the general public, (b) the loan is a consumer loan as defined in Section 70B-3-4, (c) the loan is for the personal use of the supervisor or examiner, his spouse, or dependent children, (d) in the case of examiners, the loan is not obtained from a class of institutions normally examined by the examiner, and (e) in the case of supervisors, the loan is not obtained from an institution under his supervision.

(4) Full disclosure in writing of any indebtedness incurred under Subsection (2) or (3) shall be filed in the commissioner's office.

(5) Any person who violates this section shall forfeit his office or employment and is guilty of a third degree felony. 1983

7-1-804. Malfeasance or nonfeasance by commissioner, supervisor or examiner as misdemeanor — Removal from office.

If the commissioner, a supervisor, or an examiner wilfully neglects to perform any duty provided for by law, or knowingly or wilfully permits the violation of any of the provisions of law for a period of 90 days by any institution under the supervision of the department, or knowingly or wilfully makes any false statement concerning any such institution, or is guilty of any misconduct or corruption in office, he or she is guilty of a class A misdemeanor, and shall be removed from office by the governor. 1981

7-1-805. Repealed. 1983

7-1-806. Money market funds arranging with bank to honor two-party instruments — Discouraging payment of interest to two persons on funds in transit — Pyramiding and similar schemes as misdemeanors.

from paying interest to two persons at the same time on funds in the process of transfer.

The process or the practice referred to as pyramiding or any similar process or practice as defined by the commissioner, and such definition is approved by the governor, shall be prohibited within this state and persons found guilty of these schemes shall be found guilty of a class C misdemeanor. This shall not preclude more serious punishment under federal law.

Money market funds, similar funds and bank regulated institutions shall cooperate with the commissioner to stop these practices. 1981

7-1-807. Printed checks, drafts and orders — Requirements — Violation as misdemeanor.

Every check, draft, order, or other like instrument printed for a customer of any institution issuing transaction accounts in the state as part of a series after the effective date of this act shall have on its face the name and address of the account holder, the month and year the account was opened, and the number of the check, draft, order, or other like instrument in unbroken, sequential, numerical order, beginning with the number 101, except for initial deposits to open a new account or in case of lost or stolen checks when a limited supply of unnumbered counterchecks may be issued. Any person who violates this section is guilty of a class C misdemeanor. 1983

CHAPTER 2

POSSESSION OF DEPOSITORY INSTITUTION BY COMMISSIONER

Section

7-2-1. Supervisory actions by commissioner — Grounds — Mergers or acquisitions authorized by commissioner — Possession of business and property taken by commissioner.

(1) An institution under the jurisdiction of the department shall be subject to supervisory actions by the commissioner under this chapter or Chapter 19 if the commissioner, with or without an administrative hearing, finds that:

(a) an officer of an institution or other person has refused to be examined or has made false statements under oath regarding its affairs;

(b) an institution or other person has violated its articles of incorporation or any law, rule, or regulation governing the institution or other person;

(c) an institution or other person is conducting its business in an unauthorized or unsafe manner, or is practicing deception upon its depositors, members, or the public, or is engaging in conduct injurious to its depositors, members, or the public;

(d) an institution or other person has been notified by its primary account insurer of the insurer's intention to initiate proceedings to terminate such insurance or is otherwise not in a sound and safe condition to transact its business;

(e) an institution or other person has failed to maintain a minimum amount of capital as required by the department, any state, or the relevant federal regulatory agency;

(f) a depository institution has failed or refused to pay its depositors in accordance with the terms under which the deposits were received, or has or is about to become insolvent;

(g) an institution or other person or its officers or directors have failed or refused to comply with the terms of a duly and legally authorized order issued by the commissioner or by any federal authority or authority of another state having jurisdiction over the institution or other person;

(h) an institution or other person or its officers this title or any rule or regulation of the department issued under it;

(j) any person who controls an institution or other person subject to the jurisdiction of the department has used the control to cause the institution or other person to be or about to be in an unsafe or unsound condition, to conduct its business in an unauthorized or unsafe manner, or to violate this title or any rule or regulation of the department issued under it; or

(k) the remedies provided in Section 7-1-307, 7-1-308, or 7-1-313 are ineffective or impracticable to protect the interest of depositors, creditors, or members of the institution or other person, or to protect the interests of the public.

(2) If the commissioner finds that any of the conditions set forth in Subsections 7-2-1(1)(a) through (j) exist with respect to an institution under the jurisdiction of the department, and if the commissioner also finds that an order issued pursuant to Section 7-1-307, 7-1-308, or 7-1-313 would not adequately protect the interests of the institution's depositors, creditors, members, or other interested persons from all dangers presented by the conditions found to exist, or if two-thirds of the voting shares of an institution under the jurisdiction of the department which are eligible to be voted at any regular or special meeting of the shareholders of the institution duly called for that purpose are voted at the meeting in favor of a resolution consenting to the commissioner taking or causing to be taken any of the actions described below, he may:

(a) without taking possesson of the institution, authorize, or by order of the commissioner require or give effect to, the acquisition of control of, the merger with, the acquisition of all or a portion of the assets of, or the assumption of all or a portion of the liabilities of the institution or other person by any other institution or entity approved or designated by him in accordance with the provisions of Chapter 19; or

(b) take possession of the institution or other person subject to the jurisdiction of the department with or without a court order, if an acquisition of control of, a merger with, an acquisition of all or a portion of the assets of, or an assumption of all or a portion of the liabilities of the institution or other person without taking possession does not appear to him to be practicable. Upon taking possession, the commissioner is vested by operation of law with the title to and the right to possession of all assets, the business, and property of the institution or other person subject to court order made under Section 7-2-3. While in possession of an institution or other person, the commissioner, or any receiver or liquidator appointed by him, may exercise any or all of the rights, powers, and authorities granted to the commissioner under the provisions of this chapter, or may give effect to the acquisition of control of, the merger with, the acquisition of all or a portion of the assets of, or the assumption of all or a portion of the liability of an institution or

has all the powers and privileges provided by law with respect to the liquidation or receivership of an institution, its depositors, and other creditors, including but not limited to, entering into an agreement for the purchase of assets and assumption of deposit and other liabilities by another depository institution. Such action by a federal deposit insurance agency may be taken upon approval by the court, with or without prior notice. Such actions or agreements may be disapproved, amended, or rescinded only upon a finding by the court that the decisions or actions of the receiver or liquidator were arbitrary, capricious, fraudulent, or contrary to law.

(3) The liquidator or receiver may employ assistants, agents, and legal counsel at reasonable compensation determined by the liquidator or receiver and approved by the commissioner. All expenses incident to the liquidation or receivership shall be paid out of the assets of the institution. If a liquidator or receiver is not the guaranty corporation, the Utah Credit Union League, the Credit Union Insurance Corporation, or the applicable federal deposit insurance agency, the liquidator or receiver and any assistants and agents shall provide bond or other security approved by the commissioner for the faithful discharge of their duties in connection with the liquidation or receivership and the accounting for money handled by them. The cost of the bond shall be paid from the assets of the institution. Suit may be maintained on the bond by the commissioner, and if the institution is a member of the guaranty corporation, by the guaranty corporation, and if the institution is a member of the Credit Union Insurance Corporation, by the corporation, or by any person injured by a breach of the condition of the bond.

(4) (a) Upon the appointment of a liquidator or receiver for an institution in possession pursuant to this chapter, the commissioner and the department are exempt from liability or damages for any act or omission of any liquidator or receiver appointed pursuant to this section.

(b) This section does not limit the right of the commissioner to prescribe and enforce rules regulating a liquidator or receiver in carrying out its duties with respect to an institution subject to the jurisdiction of the department. 1987

7-2-10. Inventory of assets — Listings of claims — Report of proceedings — Filing — Inspection.

As soon as is practical after taking possession of an institution the commissioner shall make or cause to be made in duplicate an inventory of its assets, one copy to be filed in his office and one with the clerk of the district court. Upon the expiration of the time fixed for presentation of claims the commissioner shall make in duplicate a full and complete list of the claims presented, including and specifying claims disallowed by him, of which one copy shall be filed in his office and one copy in the office of the clerk of the district court. The commissioner shall in like manner make and file supplemental lists showing all claims presented after the filing of the first list. The supplemental lists shall be filed every six months and at make a detailed report in duplicate of the proceeding, showing the disposition of each asset and acquired asset, one copy to be filed in his office and one with the clerk of the district court. The report, inventory, and lists of claims shall be open at all reasonable times for inspection. 1983

7-2-11. Special counsel — Employment by attorney general.

Upon taking possession of any institution or other person subject to the jurisdiction of the department, the commissioner may request the attorney general to employ special counsel on his behalf to assist and advise him in connection with a liquidation or reorganization proceeding and the prosecution or defense of any action or proceeding connected with it. 1983

7-2-12. Powers of commissioner in possession — Sale of assets — Post-possession financing — New deposit instruments — Executory contracts — Transfer of property — Avoidance of transfers — Avoidable preferences.

(1) Upon taking possession of the institution, the commissioner may do all things necessary to preserve its assets and business, and shall rehabilitate, reorganize, or liquidate the affairs of the institution in a manner he determines to be in the best interests of the institution's depositors and creditors. Any such determination by the commissioner may not be overruled by a reviewing court unless it is found to be arbitrary, capricious, fraudulent, or contrary to law. In the event of a liquidation, he shall collect all debts due and claims belonging to it, and upon approval of the court may compromise all bad or doubtful debts. He may sell, upon terms he may determine, any or all of the property of the institution for cash or other consideration, subject to final approval of the court. The commissioner shall give such notice as the court may direct to the institution of the time and place of hearing upon an application to the court for approval of the sale. The commissioner shall execute and deliver to the purchaser of any property of the institution sold by him those deeds or instruments necessary to evidence the passing of title.

(2) With approval of the court and upon terms and with priority determined by the court, the commissioner may borrow money and issue evidence of indebtedness. To secure repayment of the indebtedness, he may mortgage, pledge, transfer in trust, or hypothecate any or all of the property of the institution superior to any charge on the property for expenses of the proceeding as provided in Section 7-2-14. These loans may be obtained for the purpose of facilitating liquidation, protecting or preserving the assets in the charge of the commissioner, expediting the making of distributions to depositors and other claimants, aiding in the reopening or reorganization of the institution or its merger or consolidation with another institution, or the sale of all of its assets. Neither the commissioner nor any special deputy or other person lawfully in charge of the affairs of the institution is under any personal obligation to repay those loans. The commissioner may take any action necessary or

shareholder of the institution or any depositor or other creditor of the institution may appear and be heard on the application. Prior to the obtaining of a court order, the commissioner or special deputy in charge of the affairs of the institution may make application or negotiate for the loan or loans subject to the obtaining of the court order.

(3) With the approval of the court pursuant to a plan of reorganization or liquidation under Section 7-2-18, the commissioner may provide for depositors to receive new deposit instruments from a depository institution that purchases or receives some or all of the assets of the institution in the possession of the commissioner. All new deposit instruments issued by the acquiring depository institution may, in accordance with the terms of the plan of reorganization or liquidation, be subject to different amounts, terms, and interest rates than the original deposit instruments of the institution in the possession of the commissioner. All deposit instruments issued by the acquiring institution shall be considered new deposit obligations of the acquiring institution. The original deposit instruments issued by the institution in the possession of the commissioner are not liabilities of the acquiring institution, unless assumed by the acquiring institution. Unpaid claims of depositors against the institution in the possession of the commissioner continue, and may be provided for in the plan of reorganization or liquidation.

(4) The commissioner, after taking possession of any institution or other person subject to the jurisdiction of the department, may terminate any executory contract, including unexpired leases and unexpired employment contracts, to which the institution or other person is a party. If the termination of an executory contract or unexpired lease constitutes a breach of the contract or lease, the date of the breach is the date on which the commissioner took possession of the institution.

(5) With approval of the court and upon a showing by the commissioner that it is in the best interests of the depositors and creditors, the commissioner may transfer property on account of an indebtedness incurred by the institution prior to the date of the taking.

(6) (a) The commissioner may avoid any transfer of any interest of the institution in property or any obligation incurred by the institution that is void or voidable by a creditor under Chapter 1, Title 25.

(b) The commissioner may avoid any transfer of any interest in real property of the institution that is void as against or voidable by a subsequent purchaser in good faith and for a valuable consideration of the same real property or any portion thereof who has duly recorded his conveyance at the time possession of the institution is taken, whether or not such a purchaser exists.

(c) The commissioner may avoid any transfer of any interest in property of the institution or any obligation incurred by the institution that is invalid or void as against, or is voidable by a creditor that extends credit to the institution at the time possession of the institution is taken by the commissioner, and that obtains, at such time unaffected by and without regard to any knowledge of the commissioner or of any creditor of the institution.

(e) "Transfer" means every mode, direct or indirect, absolute or conditional, voluntary or involuntary, or disposing of or parting with property or with an interest in property, including retention of title as a security interest.

(f) The commissioner may avoid any transfer of any interest in property of the institution to or for the benefit of a creditor, for or on account of an antecedent debt owed by the institution before such transfer was made, made or suffered by the institution while insolvent, on or within 120 days before the time possession of the institution is taken by the commissioner, or between 120 days and one year before the time possession is taken if the creditor at the time of such transfer had reasonable cause to believe that the institution was insolvent, the effect of which transfer will be to enable such creditor to obtain a greater percentage of his debt than he would be entitled to under the provisions of Section 7-2-15. For the purposes of this subsection:

(i) the institution is presumed to have been insolvent on and during the 120 days immediately preceding the time possession is taken by the commissioner;

(ii) a transfer of any interest in real property is deemed to have been made or suffered when it became so far perfected that a subsequent good faith purchaser of such property from the institution for a valuable consideration could not acquire an interest superior to the transferee; and

(iii) a transfer of property other than real property is deemed to have been made or suffered when it became so far perfected that a creditor on a simple contract could not acquire a lien by attachment, levy, execution, garnishment, or other judicial lien superior to the interest of the transferee. 1987

7-2-13. Collections in liquidation — Deposit — Preference.

The moneys collected in process of a liquidation by the commissioner shall be from time to time deposited, subject to his order as herein provided, in one or more federally insured depository institutions organized under the laws of this state. In case of the suspension or insolvency of the depository institution, these deposits shall be preferred before all other deposits. 1981

7-2-14. Expenses during possession.

The expenses reimbursable to the commissioner during possession or in the course of proceedings under this chapter include the compensation of deputies, agents, clerks, and examiners employed by him and reasonable fees for counsel, accountants or consultants employed by him or on his behalf. The compensation shall be fixed by the commissioner subject to

7-2-15. Priority of obligations, expenses, and claims.

(1) The following obligations, expenses, and claims have the following priority:

(a) first, any obligation the commissioner may have under Subsection 7-2-6(3)(b) to be bound by the terms, covenants, and conditions of obligations secured by assets or property of the institution;

(b) second, administrative expenses, including those allowed under Section 7-2-14;

(c) third, unsecured claims for wages, salaries, or commissions, including vacation, severance, or sick leave pay, earned by an individual within 90 days before the date of the commissioner's possession in an amount not exceeding $2,000 for each individual;

(d) fourth, claims of depositors, other than those of controlling persons, as defined in Section 7-8a-9. Any federal deposit insurance agency or other deposit insurer is subrogated to all rights of the depositors to the extent of all payments made for the benefit of the depositors. The right of any agency of the United States insuring deposits or savings obligations to be subrogated to the rights of depositors upon payment of their claims may not be less extensive than the law of the United States requires as a condition of the authority to issue such insurance or make such payments to depositors of national banks;

(e) fifth, all other unsecured claims in amounts allowed by the court, including claims of secured creditors to the extent the amount of their claims exceed the present fair market value of their collateral. The claim of a lessor for damages resulting from the termination of a lease of property may not be allowed in an amount in excess of the rent reserved by the lease, without acceleration, for 60 days after the lessor repossessed the leased property, or the leased property was surrendered to the lessor, whichever first occurs, whether before or after the commissioner took possession of the institution, plus any unpaid rent due under the lease, without acceleration, on the date of possession or surrender. A claim for damages resulting from the termination of an employment contract, may not be allowed in an amount in excess of the compensation provided by the contract, without acceleration, for 90 days after the employee was directed to terminate, or the employee terminated, performance under the contract, whichever first occurs, whether before or after the commissioner took possession of the institution, plus any unpaid compensation due under the contract, without acceleration, on the date the employee was directed to terminate or the employee terminated performance. Claims for damages resulting from the termination of employment contracts of persons who were in control of the institution within the meaning of Subsection 7-1-103(7) are not entitled to priority under this subsection;

(f) sixth, claims for debt that are subordinated under the provisions of a subordination agreement or other instrument:

This classification is final, subject to review by the court upon a timely objection filed under Subsection 7-2-6(9). 1987

7-2-16. Interim ratable dividends.

At any time after the expiration of the date fixed for the presentation of claims and prior to the declaration of a final dividend the commissioner may, out of the funds remaining in his hands after the payment of expenses, declare one or more interim ratable dividends, such dividends to be paid to such persons and in such amounts and upon such notice as may be directed by the court. 1981

7-2-17. Disposition of records after liquidation.

After liquidation of an institution under this chapter, the commissioner shall dispose of its books, papers, and records in accordance with the order of the court. 1981

7-2-18. Plan for reorganization or liquidation of institution — Hearings — Procedure — Effect — Appeals.

(1) If the commissioner has taken possession of any institution or other person under the jurisdiction of the department he may propose to the court a plan for the reorganization or liquidation of the institution or the establishment of a new institution by filing a petition with the court, setting forth the details of the plan and requesting the court to set a day for hearing on the petition.

(2) The court shall make an order fixing a day for the hearing of the petition, prescribing the manner in which notice of the hearing is given, and may prescribe a deadline for filing written objections. The court may adjourn the hearing from time to time and no further notice is required. At the time of hearing or any adjournment of a hearing the court shall take testimony, and if it appears that it is in the best interests of the depositors and other creditors, the court shall approve the plan.

(3) A plan of reorganization or liquidation approved by the court shall be fully binding upon and constitute a final adjudication of all claims, rights, and interests of all depositors, creditors, shareholders, and members of the institution being reorganized or liquidated, and all other parties in interest with regard to the plan and with regard to any institution or other person receiving any assets or assuming any liabilities under the plan.

(4) Notice of an appeal of an order approving a plan of reorganization or liquidation shall be filed within ten days after the date of entry of the order appealed from. 1986

7-2-19. Suspension of payments by institution — Order of commissioner — Approval of governor — Period effective — Exempt payments — Operation during suspension — Modification of orders — Adoption of rules and regulations.

(1) The commissioner, whenever in his opinion the action is necessary in the public interest, may, if the governor approves, order such institutions as are subject to his supervision to suspend the payment in

tended from time to time for further periods not exceeding 60 days each.

(3) Nothing contained in this chapter shall affect the right of the institutions to pay current operating expenses and other liabilities incurred during a period of suspension.

(4) Whenever in the opinion of the commissioner conditions warrant such action, he may, if the governor approves, authorize the issuance of clearing house certificates, post notes or other evidences of indebtedness, either during a period of suspension, or during such longer period as he may prescribe, and during a period of suspension, he may permit the suspended institution to receive deposits and may authorize any such institution to pay any part of its liabilities, or of any class thereof, payment of which has been suspended.

(5) He may, if the governor approves, at any time, by order, modify or rescind any or all previous orders made by him under authority of this chapter.

(6) The commissioner may, if the governor approves, prescribe such rules and regulations as he considers necessary in order to carry out the provisions of this chapter, and an order may be issued on such terms and conditions as may be incorporated in the order. 1981

7-2-20. Repealed. 1987

7-2-21. Applicability of Utah Procurement Code.

No action of the commissioner taken under this chapter or Chapter 19 is subject to the provisions of Chapter 56, Title 63, the Utah Procurement Code. 1986

7-2-22. Termination of authority to transact business.

If an institution or other person subject to the jurisdiction of the department is operated by a federal deposit insurance agency or its appointee pursuant to a federal receivership or conservatorship for a period of 180 days or more, the authority of that institution or person to transact business under this title shall terminate upon the expiration of the 180-day period. 1987

CHAPTER 3

BANKS

Section

7-3-1. Application of chapter.

This chapter applies to all banks organized under the laws of this state, to all other banks doing business in this state as permitted by the laws and Constitution of the United States, and to all persons conducting banking business in this state except as provided in Chapter 1. 1981

7-3-2. Restrictions on conduct of banking business and bank holding companies.

(1) The establishment or operation in this state of private or partnership banks is expressly prohibited.

(2) Except as authorized by Chapter 19, Title 7, Section 7-1-702, or as specifically authorized by the laws of the United States by language to that effect and not merely by implication:

(a) No corporation or other business entity organized other than under the laws of this state may establish or maintain an office or other place of business in this state at which banking business is conducted.

(b) No corporation or other business entity organized other than under the laws of this state may conduct a banking business in this state unless it complies with all laws of this state relating to banks, to the conduct of a banking business,